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IN THE
# Supreme Court of the United States

DOUGLAS R.M. NAZARIAN, ET AL.,
*Petitioners,*
v.
PPL ENERGYPLUS, LLC, ET AL.,
*Respondents.*

CPV MARYLAND, LLC,
*Petitioners,*
v.
PPL ENERGYPLUS, LLC, ET AL.,
*Respondents.*

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATION ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*

The American Public Power Association and the National Rural Electric Cooperative Association write in support of the Petition of Petitioners Douglas R.M. Nazarian, *et al.* for writ of *certiorari* in No. 14-614 and Petitioner CPV Maryland, LLC, for writ of *certiorari* in No. 14-623.[1] The Associations appeared below as *amici* supporting Appellants and reversal of the district court.

The American Public Power Association (APPA) represents the Nation's more than 2,000 not-for-profit, publicly owned electric utilities, which serve over 47 million customers, in every state except Hawaii, and provide over 15 percent of all kilowatt-hour sales of electricity to ultimate customers. APPA's utility members are load-serving entities, with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA's members with the long-term interests of the residents and businesses in their communities.

The National Rural Electric Cooperative Association (NRECA) represents the Nation's more than 900 not-for-profit, member-owned rural electric utilities, which provide electricity to approximately 42 million consumers in 47 states, or 13 percent of the Nation's population. Rural electric cooperatives

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

account for approximately 11 percent of all kilowatt-hour sales of electricity in the Nation. NRECA's members also include approximately 65 generation and transmission (G&T) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

Both Associations' utility members participate in wholesale power markets in regions of the Nation where "Regional Transmission Organizations" (RTOs), including the RTO discussed in this case, PJM Interconnection, L.L.C. (PJM), operate the electric transmission grid. Since the advent of RTOs almost fifteen years ago, the Associations' members in RTO regions have continued to exercise their business judgment to obtain electric generation capacity and electric energy from various sources, including (a) generation facilities they purchase or build; (b) purchases under long-term and short-term bilateral wholesale contracts; and (c) purchases from RTOs. The Associations' interest in this case is to ensure that their members continue to be able to obtain the mix of generating capacity resources that, in their judgment, best enables them to meet their environmental and other regulatory obligations and provide safe, adequate and reliable electric service at the lowest reasonable cost.

The Court of Appeals' decision determines an important federal question, holding that the Federal Power Act (16 U.S.C. §§ 791a – 828c (the "FPA")) preempts a directive of the Maryland Public Service Commission that Electric Distribution Companies ("EDCs") engaged in providing retail "standard offer

service" within the State of Maryland, as part of their standard offer supply obligations,[2] enter into a twenty-year Contract for Differences ("CfD") relating to generating capacity[3] to be sold into an annual auction conducted by PJM. The decision below conflicts with decisions of this Court concerning both field and conflict preemption in federal regulatory regimes, such as the FPA, that explicitly reserve roles for state regulatory authority, holding that while "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . it is also true that a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (internal citation omitted). *See also Nw. Cent. Pipeline Co. v. Kan. Corp. Comm'n*, 489 U.S. 493, 512 (1989) (courts should "avoid encroachment on the powers Congress intended to reserve to the States . . . 'by an extravagant mode of interpretation . . . .'"). The decision below also conflicts with prior decisions of this Court explaining the operation of the regulatory

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[2] "Standard Offer Service" is retail electric service that electric utilities engaged in the distribution of electricity at retail within the State of Maryland are obligated to obtain and provide on behalf of their customers who do not choose a different, competitive electricity supplier. (14-614 Pet. App. 106a-107a). The specific utility obligations associated with standard offer service are set forth in Md. Code, Pub. Utils. Art., § 7-510(c).

[3] "'Capacity' . is a standby commitment made by a capacity resource to either produce electric energy or to consume less electric energy at a time in the future when called upon by PJM to do so." (Pet. App. 86a-87a). "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165, 168 (2010).

authority granted by FPA Sections 205 and 206 as to who "sets" wholesale electric power rates under the FPA. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 352-353 (1956); *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332, 341 (1956).

The decision below misapplies both field preemption and conflict preemption principles based on a mistaken view of the function and purpose of centralized capacity auctions, and an equally mistaken premise that the Federal Energy Regulatory Commission, rather the process of contracting between participants in wholesale markets, "sets" wholesale power rates. The Court should grant the petitions because the decision below, if allowed to stand, will substantially disrupt the sound functioning of the Nation's wholesale electric power markets, at least in those parts of the eastern United States served by RTOs, and is likely to impede the orderly development of needed electric infrastructure at reasonable cost.

## SUMMARY OF ARGUMENT

The decision below rests on a simplistic and inaccurate view of how centralized capacity auctions, like the PJM Reliability Pricing Model at issue in this case, actually operate. The Court of Appeals' conclusion that the Maryland Public Service Commission's Order (Pet. App. B) "is field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction,"[4] and its conflict preemption conclusion,[5] both misunderstand the relationship between bilateral contracts and the

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[4] Pet. App. 19a–24a.

[5] *Id.* at 24a–28a.

functioning of RTO-operated centralized capacity auctions. The FERC itself has long held that centralized capacity auctions are intended to operate in tandem with robust bilateral markets, precisely because it is the bilateral markets that actually support the addition of needed energy infrastructure with long-term and predictable contract revenues. The preemption finding below is wrong because the centralized capacity auction price on which the Court of Appeals concentrated its attention, and the bilateral contract capacity price set by Petitioner CPV Maryland for the sale of capacity from its proposed new generating unit to Maryland's distribution utilities under the Maryland Public Service Commission order found preempted below, are intended by the FERC to coexist and fulfill distinct roles in promoting generation adequacy and reliability within the PJM RTO.

Contrary to the conclusions of the Court of Appeals, long-term contracting by load-serving entities concerning generating capacity, like that directed by the Maryland Commission in the order challenged below, is intended by FERC to operate as a component of a broader wholesale market of which PJM's centralized capacity auction is also a part. The Maryland Commission order challenged in the proceedings below simply created a way for Maryland's retail electric utilities to respond to "price signals" provided by PJM's centralized capacity auction and by the long-term bilateral wholesale market to which the retail utilities were otherwise indifferent because PJM capacity charges are simply passed-through to retail customers. In holding that the contracts into which the Maryland Commission required the State's retail electric utilities to enter were preempted by FERC's approval of the auction

mechanisms in PJM's centralized capacity auction, the Court of Appeals conflated two distinct rate-setting processes, each of which has a distinct and well-recognized role in the relevant wholesale electric power market. The Court of Appeals' conclusion that the Maryland Commission's order "is preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction" (Pet. App. 19a) rests ultimately on the erroneous notion that there is only a single price permitted by the FPA for the sale of generating capacity in PJM.

As part of this premise, the decision below also supposes that the FERC sets wholesale rates (*id.*). This element of the decision parts company with a long line of settled decisions of this Court holding that the power conferred on the FERC by the FPA "is simply the power to review rates and contracts made in the first instance by. . . [utility] companies and, if they are determined to be unlawful, to remedy them."[6] Prior to the decision below, it had long been understood that:

> Sections 205 and 206(a) 'are simply parts of a single statutory scheme under which all rates are established initially by the (utilities), by contract or otherwise, and all rates are

[6] *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332, 341 (1956), cited in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 352-353 (1956) (" we construed the Natural Gas Act as not authorizing unilateral contract changes, and that interpretation is equally applicable to the Federal Power Act. Accordingly, for the reasons there given, we conclude that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra").

> subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on (utilities) as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of (electric utilities)."[7]

Under these and other authorities discussed *infra*, the Court of Appeals' reductive application of *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) – "If states are required to give full effect to FERC-mandated wholesale rates on the demand side of the equation, it stands to reason that they are also required to do so on the supply side" (753 F.3d at 476) – simply misunderstands the FERC's regulatory role. This is a second, but equally important, reason for granting the petitions. In the 58 years since it decided *Sierra Pacific Power Co.*, this Court's explanation of the paramount importance of contracts in the Nation's electric power industry has become increasingly critical to the functioning of that industry. The decision below departs from this settled understanding of the operation of the FPA. Unless corrected by the grant of *certiorari* here, that departure threatens the stability of a bedrock principle on which the operation of the electric power industry depends.

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[7] *Papago Tribal Utilities Authority v. FERC*, 610 F.2d 914, 924 (D.C. Cir. 1980), *quoting United Gas Pipeline Co. v. Mobile Gas Service Co.*, *supra*, 350 U.S. at 341.

## ARGUMENT

"PJM Interconnection ('PJM') is the RTO that manages the regional transmission system spanning from New Jersey west to Chicago and south to North Carolina." *N. J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82 (3d Cir. 2014). It is a regulated public utility under the FPA. *Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC ¶ 61,170, PP 16-21 (2003).

The FERC regulates two parallel markets for generating capacity within the PJM region. One of those markets is the centralized capacity auction operated by PJM, the Reliability Pricing Model. Like the regional resource adequacy arrangements from which they evolved,[8] centralized capacity auctions set a price for generating capacity supplied to load-serving participants that have not otherwise supplied their allocated share of applicable regional capacity requirements.

The second of these two parallel wholesale markets is bilateral contracting between load-serving utilities and generation owners for the purchase and sale of entitlements in generating capacity, and related transactions. It is this second, bilateral market that actually generates the overwhelming majority of the capitalization required to support the construction of new generating resources. *Amicus*

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[8] As the FERC summarized PJM's earlier resource adequacy arrangement, "each [load-serving entity] must procure capacity resources equal to a fixed percentage above its peak load to ensure a sufficient amount of capacity to meet the forecasted load plus reserves adequate to provide for the unavailability of capacity resources, load forecasting uncertainty, and planned and maintenance outages." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 9 (2006).

APPA has observed and reported on generating facility construction trends for the past several years, publishing an annual review entitled *Power Plants Are Not Built on Spec.*[9] Continuing trends observed in publicly reported data on power plant construction, APPA observed that, for new generating capacity entering service during 2013:

- Two-thirds of the capacity was built with purchased power agreements (PPAs) for the sale of the power (64 percent of PPAs were with a utility and 2 percent with an end-use customer or non-utility retail supplier).

- Another 31.6 percent was constructed under ownership by the utility (29.6 percent) or customer (2 percent).

- Just 2.4 percent was built solely for sales into RTO markets (at most—plants for which no information was available were assumed to be built for market sales). The vast majority of the 2.4 percent of capacity built only for market sales received some type of external funding, such as grants from the American Reinvestment and Recovery Act (ARRA) or a state or foundation.

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[9] APPA's 2014 *Power Plants Are Not Built on Spec* report can be found on-line at http://appanet.files.cms-plus.com/PDFs/94_2014_Power_Plant_Study.pdf (last viewed December 22, 2014).

In concluding that activity in the bilateral contractual market for generating capacity is somehow subordinate to the outcome of FERC-supervised centralized capacity auctions, the Court of Appeals decision sows seeds of doubt that will likely impede the development of needed infrastructure for a considerable period – even if the decision itself is quickly overturned on *certiorari*. Investors are obviously diffident about committing the hundreds of millions, or even billions, of dollars needed to build a new power plant, and developers are unlikely to devote the years of necessary effort to planning and permitting, for the payoff of a one-year contract at an uncertain price three years in the future.

It was the capital-intensive nature of generation development, and the long time frames associated with planning, permitting, development and capital recovery for generating plants that led the FERC to observe, in announcing its Reliability Compensation Policy early in its supervision of the PJM capacity market (*PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004)):

> . . . [W]e are mindful of the comments made to us by representatives of the financial community, that dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure. A clear preference for long-term contracts and/or reliable revenue streams was stated. Ideally, the market should encourage [load-serving entities] to engage in long-term bilateral

> contracting to support needed investment. . . .

In its initial order accepting elements of the RPM proposal, FERC "conclude[d] that, after [load-serving entities] have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction ...," but "[t]his, however, should be a last resort." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, P 71 (2006). As FERC described it, PJM's proposal was that load-serving entities "may either (a) build their own needed capacity or create an incentive for the construction of new capacity by entering into long-term bilateral agreements, (b) refrain from entering into bilaterals and pay the (presumably higher) prices set by the [proposed RPM auction] demand curve, or (c) develop transmission or demand response solutions to capacity problems." *Id*, P 172. Soon thereafter, FERC approved a settlement that "preserve[d] provisions of [PJM's proposal] that support self-supply and bilateral contracts ...." *PJM Interconnection*, 117 FERC ¶ 61,331, P 29. In 2011, FERC approved amendments to the PJM capacity auction rules, but those rules continued to provide for participation in the auction by capacity resources that load-serving entities own or acquire by bilateral contract. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, PP 191–197, *order on reh'g*, 137 FERC ¶ 61,145 (2011), *rev. denied sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir.). The currently effective RPM structure contains provisions to accommodate self-supplied capacity that load-serving entities own or acquire in the bilateral market. *N.J. Bd. of Pub. Utils, supra*, 744 F.3d at 83 n. 4. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, PP 107–115 (2013), *reh'g pending*.

## I. The Decision Below Conflates Two Distinct Capacity Markets, Misapplying Field and Conflict Preemption Principles

### A. Field Preemption Does Not Apply

The decision below found the Maryland Public Service Commission's directive to Maryland utilities engaged in providing Standard Offer Service to enter into a CfD with Petitioner CPV Maryland to be "field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction" (753 F.3d at 476). This characterization is literally incorrect, as shown by the Court of Appeals' own description of the Contract for Differences (Pet. App. 14a):

> The [Contract for Differences] required CPV to build a plant and sell its energy and capacity on the federal interstate wholesale markets. If CPV successfully cleared the market, it would be eligible for payments from the [Maryland Electric Distribution Companies] amounting to the difference between CPV's revenue requirements per unit of energy and capacity sold (set forth in its winning bid) and its actual sales receipts. These costs would in turn be passed on to the EDCs' retail ratepayers. If CPV's receipts exceeded its approved revenue requirements, it would be

> obligated to pay the difference to the EDCs. The CfDs did not require CPV to actually sell any energy or capacity to the EDCs.

What the Court of Appeals described is a hedge, for a twenty-year term, against price volatility in twenty annual RPM Base Residual Auctions that establish a single year's auction price, three years in advance of the effective date of the capacity option sold in the Base Residual Auction. That hedge operates bilaterally, between the Maryland Electric Distribution Companies and Petitioner CPV, to provide the kind of "incentive for the construction of new capacity by entering into long-term bilateral agreements" that was precisely contemplated by FERC as operating in parallel to the PJM Reliability Pricing Model auctions (115 FERC ¶ 61,079 at P 172). The Contract for Differences does not involve any review of wholesale electric power rates by the Maryland Commission, nor does it purport to empower the Maryland Commission to prescribe or to modify any rates or charges resulting from the PJM Base Residual Auction. Instead, the Contract for Differences is an exchange, between the Maryland Electric Distribution Companies and Petitioner CPV, of the risk of particular outcomes of the Base Residual Auction in the FERC-regulated PJM centralized capacity market. The Contract for Differences does not determine those outcomes and, for the reasons explained immediately below, it cannot influence those outcomes. The operation of the Contract for Differences is thus entirely consistent with FERC's early recognition in its Reliability Compensation Policy Order that "dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure" and that

"the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment" (107 FERC ¶ 61,112 at P 20).

In addition, the Contract for Differences neither had nor could have had any impact on the price that Petitioner CPV received in the Base Residual Auction. As the District Court found (Pet. App. at 125a-126a), Petitioner CPV's bid was established by PJM itself under its Minimum Offer Price Rule ("MOPR"), a bid price that was based on PJM's determination of the costs of its proposed generating facility, calculated *without* the benefit of the Contract for Differences.[10] The PJM-established bid for CPV's capacity was below the maximum price set by the Base Residual Auction, and therefore "cleared" the Auction for 2015 (*id.*), at a price level that both PJM and FERC concluded satisfied the statutory "just and reasonable" standard of FPA Sections 205 and 206. *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 143 (2013).

The Maryland Public Service Commission's directive, to utilities subject to its authority, to promote the construction of new generation within Maryland by entering into a hedging arrangement with the developer of that new generation does not implicate any recognized variety of preemption. *La. Pub. Serv. Comm'n v. FCC*, *supra*, 476 U.S. at 368-

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[10] PJM's Minimum Offer Price Rule ("MOPR") requires individualized scrutiny of proposed bids in the Base Residual Auction that fall below specified thresholds, in order to prevent non-PJM revenues that may not be available to other bidders from influencing the clearing price in the Auction. The history, evolution and purpose of the PJM MOPR is explained at length in *N.J. Bd. of Pub. Utils. v. FERC*, *supra*, 744 F.3d at 84-92.

369 (identifying and summarizing six "varieties" of preemption and the circumstances in which they arise). The Court of Appeals' reliance below (Pet. App. 20a–21a) on *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) and *Appalachian Pwr. Co. v. FERC*, 812 F.2d 898 (4th Cir. 1987) is misplaced, as both of those cases involved efforts by state regulatory commissions to re-evaluate, for purposes of setting retail rates, allocations or determinations of costs that FERC had found just and reasonable in its review of wholesale contracts. In this case, in contrast, the Maryland Commission directed Maryland EDCs to contract with Petitioner CPV for what the Court of Appeals characterized as "a system of rebates and subsidies calculated on the basis of the PJM market rate" (Pet. App. 19a) which affect neither the determination of prices nor the resulting obligations that are "set" by the PJM Reliability Pricing Model and its Base Residual Auction.

The Federal Power Act "is premised on contractual agreements voluntarily devised by the regulated companies" (*Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)). In the Act, Congress "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 479 (2002). In the context of FERC's current reliance on market forces to restrain wholesale rates to just and reasonable levels, it is axiomatic that "[m]arkets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547

(2008). The Maryland Commission's directive to Maryland's Electric Distribution Companies to enter into the hedging arrangement in this case that the Court of Appeals concluded was preempted by the Federal Power Act may more appropriately be viewed as an exercise of authority properly reserved to the states[11] by Section 201(b)(1) of the FPA. [12] *See New York v. FERC*, 535 U.S. 1, 24 (2002) (explaining concurrent spheres of FERC and state regulation under FPA Section 201(b)(1)). Ultimately, without the need to establish specific metes and bounds of the respective regulatory regimes of the FERC and state regulatory commissions in this context, the Maryland Commission's directive to the Electric Distribution Companies operating under its regulatory authority represents a response, in the form of bilateral contracting to reduce price volatility and encourage

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[11] The Maryland statute pursuant to which the Maryland Commission issued the Order at issue in this proceeding (Nazarian Pet. App. at 54a) provides in relevant part that "In order to meet long-term, anticipated demand in the State for standard offer service and other electricity supply, the Commission may require or allow an investor-owned electric company to . . acquire its own generating facilities subject to appropriate cost recovery." Md. Code, Pub. Utils. Art. § 7-510(c)(6). Reviewing the Maryland Commission's Order, the Maryland appellate court ruled that "the Commission's orders directing the EDCs to negotiate and enter into a CfD with CPV and to recover their costs, or return their credits, through the SOS were within its statutory authority." *In re Petition of Calpine Corp.* 2013 Md. Cir. Ct. LEXIS 14, *32 (Cir. Ct. Balt. 2013). As this Court has held, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states," *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

[12] 16 U.S.C. § 824(b)(1), which provides in relevant part that "[t]he Commission...shall not have jurisdiction, except as specifically provided...over facilities used for the generation of electric energy..."

the development of new energy infrastructure that FERC had long encouraged in connection with its oversight of centralized capacity auctions, including specifically PJM's Reliability Pricing Model.[13] In this regard, FERC's repeated acknowledgement of the importance of bilateral contracting for capacity to fulfill the PJM region's infrastructure needs strongly counsels against the Court of Appeals' preemption conclusion here. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 721 (1985) (". . . since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal").

The danger posed by the Court of Appeals' decision to the Nation's ability to fulfill its current and future energy infrastructure needs through stable,

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[13] *ISO New England, Inc.*, 138 FERC ¶ 61,027 at P 74 (2012) ("The establishment of such an offer floor does not prohibit parties from self-supplying. Parties may self-supply with existing capacity, which is not subject to the economic benchmarks established by the April 13 Order. Parties may also self-supply with new capacity, provided these new resources clear the auction"); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 208 (2011) ("the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models"); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, P 29 (2006) ("The Settlement preserves provisions that support self-supply and bilateral contracts through various means, including capacity pricing hubs and electronic forums for bilateral transactions"); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004) (" dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure. . . Ideally, the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment.

long-term, bilateral contractual arrangements that provide a secure revenue stream for financing is manifest. The need for such arrangements has been acknowledged repeatedly by the federal agency whose jurisdiction the Court of Appeals sought to protect with its preemption ruling. There is no plausible suggestion that the State regulatory initiative here poses any genuine prospect of interference with the operation of federal regulation.

### B. There Is No Conflict Preemption

The Court of Appeals further concluded (Pet. App. 24a–29a) that the Maryland Public Service Commission's directive that Maryland's Electric Distribution Companies enter into a Contract for Differences with Petitioner CPV was "conflict preempted" because it "interferes with the method by which the federal statute was designed to reach its goals."[14] The Court of Appeals noted two specific grounds for this conclusion. First, the Court stated (Pet. App. 26a) that the payments established by the Contract for Differences "directly conflict with the auction rates approved by FERC." Second, the Court observed (*id.*) that the term of the Contract for Differences was twenty years, in contrast to a three-year price guarantee (the "new entry price adjustment," or "NEPA") available under PJM's Reliability Pricing Model.

The central problem with the Court of Appeals identification of these "conflicts" is that the

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[14] Pet. App. 25a (internal quotation omitted). The Court of Appeals' formulation of what has come to be called the "obstruction" branch of conflict preemption analysis originated in *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

characterization of conflict is at odds with FERC's own description of its objective of having a bilateral contractual market operate in tandem with the Reliability Pricing Model centralized capacity auction. From its earliest review of PJM's centralized capacity auction, FERC has explained that "dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure" and that "the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment." *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004). Far from interference or obstruction of FERC's purposes in regulating PJM's centralized capacity auction, the long-term bilateral contracting directed by the Maryland Commission in this case was, as shown by FERC's Reliability Compensation Policy order quoted above, an intended and indispensable counterpart to the attainment of those purposes. The Court of Appeals' contrary assessment overlooks FERC's consistent statement of its goals in that regard, and FERC's persistent efforts to ensure that the long-term bilateral contract market and PJM's centralized capacity auction operate in tandem. There is therefore no conflict preemption involved in this case. Rather, the Court of Appeals indulged here in precisely the "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" which "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Gades v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

## II. The Decision Below Mistakenly Concluded That the Maryland Commission "Set" Rates

The Court of Appeals concluded (Pet. App. 19a) that the Maryland Commission's Order "is field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction." The Maryland Commission set no rate in this case. Nor could its directive to the Electric Distribution Companies operating under its supervision have displaced any action undertaken by the FERC, because utilities – not the FERC – set rates under the Federal Power Act. Petitioner CPV set the rate at which it was willing to enter into the twenty-year Contract for Differences with the Maryland EDCs. As the District Court recognized (Pet. App. at 125a-126a), PJM (another public utility) set the price at which CPV was permitted to bid in the 2012 Base Residual Auction, which in turn determined a one-year level of payments to CPV for its assumption of capacity supply obligations under the PJM Reliability Pricing Model. The Court of Appeals' preemption conclusions in this case both rest on that Court's misplacement of the locus of rate setting authority under the Federal Power Act.

Prior to the decision below, it had long been understood that:

> Sections 205 and 206(a) 'are simply parts of a single statutory scheme under which all rates are established initially by the (utilities), by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the

> Commission and imposes such duties on (utilities) as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of (electric utilities).'[15]

In the Federal Power Act, Congress "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 479 (2002). The result of Congress's decision to rely on contractual rate setting means that the Act "is premised on contractual agreements voluntarily devised by the regulated companies" (*Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)). Concomitantly, the FERC has no authority to require a public utility "to cede rights expressly given to them in section 205 of the Federal Power Act . . . . the very statutory rights given to them by Congress." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002). Simply put, "the FPA reserves to the utility, and not to FERC, the power to establish rates, by contract or otherwise." *Town of Barnstable v. Berwick*, 17 F. Supp.3d 113, 124 n. 26 (D. Mass. 2014), *appeal pending*, No. 14-1597 (1st Cir. filed June 2, 2014).

Here, as stated above, Petitioner CPV set the "rate" in the Contract for Differences. To the extent that rate was subject to Section 205 or 206 of the FPA, it was incumbent upon Petitioner CPV to make the appropriate filing with FERC and to demonstrate

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[15] *Papago Tribal Utilities Authority v. FERC*, 610 F.2d 914, 924 (D.C. Cir. 1980), *quoting United Gas Pipeline Co. v. Mobile Gas Service Co.*, *supra*, 350 U.S. at 341.

that its rate was just, reasonable and not unduly discriminatory. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at P 69 (2010), or, in the alternative, to defend against a complaint by a third party that the rate was not just and reasonable. The Maryland Commission did not "set" any rate in connection with the Contract for Differences. The Court of Appeals' contrary holding in the case below impedes the ability of load-serving utilities and developers of generation to enter into long-term contracts that the electric power industry urgently requires for the financing of energy infrastructure.

## CONCLUSION

For the foregoing reasons, the petitions for writ of *certiorari* of Petitioners Nazarian, *et al.* and of CPV Maryland should be granted.

Respectfully submitted,

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